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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-600

DONALD E. PERCY, Secretary,
WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Petitioner,

v.

RONALD FRANCIS TERRY a/k/a
BARBARA LYNN TERRY,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The Decision Below Raises An Issue Of National Significance.

The respondent asserts that the Supreme Court of Wisconsin did not extend this court's holding in

O'Connor v. Donaldson, 422 U.S. 563 (1975), and that the procedural due process issue is not one of national importance. Neither assertion accurately reflects the decision of the Supreme Court of Wisconsin, nor the reasons upon which that court's decision was based. [1]

The central determination of the Supreme Court of Wisconsin was that the Fourteenth Amendment to the United States Constitution, as interpreted by this court in *O'Connor*, prohibits the state from continuing an involuntary sex deviate commitment reached after a criminal conviction without a hearing at which *Morrissey v. Brewer* [2] procedural requisites were applied. *See State ex rel. Terry v. Schubert*, 74 Wis.2d 487, 495-497, 247 N.W.2d 109, 113-114 (1976). The Supreme Court of Wisconsin viewed O'Connor as requiring a procedure to review the commitment between the initial commitment and the end of the maximum term of confinement because the custodial department must discharge the criminally convicted and adjudged sex deviate "as soon as in its opinion there is a reasonable probability that he can be given full liberty without danger to the public." [3] *State ex rel. Terry v. Percy*, 84 Wis.2d 693, 695-696, 267 N.W.2d 380, 381 (1978).

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[1] Respondent's brief also makes several other erroneous assertions as to matters not of record, most particularly his assertion that the custodial department has "promulgated" hearing regulations, Respondent's Brief in Opposition, page 3, and his assertions of what the petitioner's state court brief's "acknowledged," Respondent's Brief in Opposition, page 2.

[2] 408 U.S. 471 (1972).

[3] Wis. Stat. sec. 975.11.

O'Connor v. Donaldson, however, decided a substantive due process issue only, viz., the state may not confine a nondangerous individual unless to protect the individual or to protect society. *O'Connor v. Donaldson* does not apply when commitment follows a criminal conviction, as in respondent's case. A predicate for the loss of liberty was determined beyond a reasonable doubt by the criminal conviction.

Nor does the liberty interest created by Wis. Stat. sec. 975.11 necessitate the *Morrissey* procedures the Supreme Court of Wisconsin required. Section 975.11 requires the custodial department to discharge criminally convicted and adjudged sexual deviates prior to the end of the term of confinement if the custodial department reasonably believes full liberty can be restored without danger. [4] The statute does no more than any other statute that requires release upon the occurrence of a condition precedent. Another example of such a statute is 18 U.S.C. sec. 4163 [5], which provides for discharge from imprisonment when the sentence term, less good time earned, is reached.

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[4] The maximum sentence for the underlying crime determines the term of confinement. Wis. Stat. sec. 975.12. To continue confinement after that, the custodial department must establish dangerousness to self or others, beyond a reasonable doubt. Respondent has not reached the end of the initial term of confinement.

[5] 18 U.S.C. sec. 4163 provides, in pertinent part,:

"Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. . . ."

There are many similar statutes in all the states that set an ascertainable time for release, either from a commitment altogether or from physical confinement. Because such statutes require release, they create liberty interests. When the existence of the interest requires the occurrence of a condition precedent, as in this case, the individual has not been *deprived* of the liberty interest created by statute until the condition occurs.

The issue is simple and yet important. The Fourteenth Amendment provides the state may not "deprive any person of . . . liberty . . . ." Is there a deprivation of a liberty interest if the condition precedent to the existence of the liberty interest has not occurred? That is the issue in this case. It is also the issue in the parole grant decision-making context. The issue is one of national importance.

CONCLUSION

This court should grant its writ of certiorari to review the judgment of the Supreme Court of Wisconsin.

Respectfully submitted,

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